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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1324

CHESTER DeWITT MENK,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on November 21, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported. The opinion is printed in the appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals was rendered final by the denial of Petitioner's petition for rehearing on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Circuit Court of Appeals is correct in affirming a conviction on the basis of a holding "that a trained, experienced Federal District Court Judge, as distinguished from a jury, must be presumed to have exercised the proper discretion in distinguishing between the improper and the proper evidence introduced at trial" while finding that incompetent evidence of other crimes by the accused was admitted at the trial and that "the admission of such evidence constituted error, and if this had been a jury trial we would be compelled to reverse" and where the record showed that the trial judge, in his summation of the evidence and explanation of his finding stated that "The criminal mind just does not work that way, and we are dealing here with a criminal mind . . . he had prostitutes on his premises. According to him, he takes in any tramp that walks up the road. And yet he wants me to believe that he is absolutely free and clear of the offenses with which he is charged."
2. Whether a waiver of trial by jury by a criminal defendant can be held to constitute a waiver of his right to procedural due process at his trial.

CONSTITUTIONAL PROVISION INVOLVED

"No person shall be . . . deprived of life, liberty or property, without due process of law;

Constitution of the United States, Amendment V

STATEMENT OF THE CASE

The petitioner in this cause was charged in a four count indictment on December 15, 1966 with various dangerous drug offenses under Title 21, United States Code, Section 331(a)(2). Thereafter, on May 27, 1967 the petitioner was arraigned and pleaded not guilty and then on September 13, 1967 he filed a waiver of trial by jury which was agreed to by the government and accepted by the court. The case was tried before the court on September 20, 1967. At the trial the government called only two witnesses. One was a chemical identification witness whose testimony is of no significance to this appeal and the other was an undercover-agent witness who had purchased dangerous drugs from associates and employees of the petitioner. From the inception of the trial there was a constant focus by the prosecution on the subject of crimes other than those charged in the indictment with interjected questions by the court going to the same irrelevant matters and with repeated overrulings of defense objections to such collateral inquiry. Over objection the government's said witness testified that the petitioner's co-defendant had stated that the petitioner "is laying low and that he has been in some trouble with the law" and that the witness was advised further that the petitioner was involved with slot machines. These items of testimony included the following testimony, objection and ruling:

> The Witness: Chester Menk then told me that on one occasion two Excise men tried to arrest his brother, Elmer, and that he hit him over the head with a shot-gun and [they] didn't arrest him.
>
> Defense Counsel: Your Honor, I am going to object to this testimony. I can't see any bearing it has on the case. The only result would be highly prejudicial to the defendants here, because they are bringing in other matters, bringing in other alleged crimes, and I think it is very prejudicial to the defendants if he is going to bring in testimony of

anything other than the instant charge or any related charge showing intent. Certainly there is no connection between an alleged assault and battery and going to kill an informer and the case here.

The Court: I will overrule the objection. Go ahead.

The Witness: He made a point at that point that Elmer Menk was not arrested . . .

After this ruling by the court, the inquiry into the appellant's character and other offenses by the petitioner continued without letup. The government's witness related that he discussed the possibility of dealing in stolen merchandise with petitioner's co-defendant and he further related that the petitioner's co-defendant said the people often stopped by the petitioner's truck stop to deal in stolen merchandise. In the defense, presentation, all three of the defendants, including the petitioner, testified. In the course of their cross-examination the subject of the petitioner's other illegal dealings was pursued relentlessly by the prosecution with occasional questions of like nature interjected by the court. The subject of prostitution at the petitioner's business establishment was the main point of inquiry during the cross-examination of the first co-defendant to testify. She was asked if she had any duties besides those of waitress and cook at the petitioner's establishment and then she was asked if there were bedrooms on the premises. The subject then was switched to "hot" merchandise and then the pertinent subject of pills was touched upon briefly. After the said brief interlude the subject returned to what the other girls who worked at the petitioner's restaurant did besides work at the restaurant and to the question of how many girls worked there and to elicitation of the fact that the girls took a week off periodically. At this point the court asked the co-defendant "What was so hard about this waitress job that the girls had to take a week off out of every month?" and then the court asked, "What kind of meals did you serve at that restaurant?" The prosecutor then asked the said co-defendant

if she were "good friends" with the petitioner and then the co-defendant was asked "who hired the girls that worked there?" and when it was stated that the petitioner hired them the co-defendant was asked if she thought it unusual or if she knew of any other restaurants where the waitresses worked for four or five weeks and then go away for a week. And then the co-defendant was asked if she were present when the waitresses were hired by the petitioner and if it were a condition of their employment that they could work four weeks and take off a week. Then, for the balance of the said co-defendant's cross-examination (which amounted to one third of the total cross) the pertinent subject of pep pills became the object of the inquiry. The second co-defendant to testify gave very little testimony and was not cross-examined because he was severely afflicted with syphillis. The cross-examination of the petitioner consisted of the same predominance of inquiry into matters reflecting upon the general character of the petitioner (apart from and in addition to criminal convictions). The prosecution began the cross by stating: "I am interested, Mr. Menk, in these girls that used to work at the Shifting Sands" and proceeded to ask the petitioner how much he paid them. This was followed by a remark by the prosecutor that the girls apparently got room, board and all they could steal. Then the petitioner was asked if there were a difference between the cafe he was running at the time of the trial and the restaurant which he had at the time of the alleged offense and then the petitioner was asked if there were sleeping quarters in his new establishment and if there were any girls in the new establishment. Then the court interjected a question, asking: "What happened to the girl from Georgia?" eliciting an answer to the effect that "she got on a drunk and walked off." Then the petitioner was asked if he had a menu or a cash register in his new establishment, eliciting the response that he didn't have a menu but he did have a cash register, however, the cash register didn't work. Then, through the next portion of the petitioner's cross-examination, which

amounted to less than twenty percent of the total cross-examination, the inquiry was directed toward the subject of the offense alleged in the indictment. After this interlude the petitioner was questioned concerning slot machines being found in a raid at his restaurant which took place some five months before the petitioner's first alleged offense. Then the petitioner was asked to enumerate all the things taken from his restaurant in the raid that occurred five months before his first alleged offense. The petitioner responded that watches and rolls of dimes had been taken in the raid. The petitioner then was asked if he had ever bragged about hitting anyone over the head with a shotgun. The trial ended without further evidence.

The comments of the trial court at the close of the evidence showed that the inquiry into the activities of the girls at the petitioner's establishment could have had no relevance and that the said prolonged inquiry amounted to nothing more than a sporting venture. The trial court stated:

> "The waitresses at this place were characterized by Mr. Sopsic [the government's undercover witness] as prostitutes, and neither Menk—neither one of the Menks or Mrs. Bingham has ever denied that."

The trial court also made clear what inferences it was drawing from the complained of testimony:

> "So he had prostitutes on his premises. He had slot machines on his premises. According to him he takes in any tramp that walks up the road. And yet he wants me to believe that he [the petitioner] is absolutely free and clear of the offense with which he is charged."
>
> * * *
>
> "The criminal mind just does not work that way, and we are dealing here with a criminal mind, on his own admission that he has heretofore been convicted of various offenses, some of which are felonies."

The trial court then found the petitioner guilty on both counts of the four-count indictment which named him as a defendant and on December 1, 1967 the trial court entered judgment against the petitioner sentencing him to the maximum sentence of two years on each count to be served consecutively. A timely appeal was taken to the United States Court of Appeals for the Seventh Circuit and all of the matters being complained of herein were complained of in that appeal.

REASONS FOR GRANTING WRIT

The highly irregular proceedings which have preceded this application for a writ of certiorari have demonstrated both the personal unworthiness of the petitioner and the importance of abstracting such personal considerations from the judicial process. It is probable that the "Dogpatch" quality of the petitioner's way of life was a substantial factor which led the trial court into a pattern of judicial conduct far below the recognized standards. The Seventh Circuit, in its decision in this case, took notice of the general competence of the trial judge who presided herein and this presentation is not disputing that judicially noted fact. It is the presumption that a trial judge in a case at law can do no wrong in evaluating the evidence that is under attack in this petition and not the particular trial judge who benefited from the said presumption in the appeal of this case to the Seventh Circuit.

The reason why the petitioner herein believes that certiorari should be granted is presented in three parts. Part A is directed to the manner in which the Seventh Circuit Court of Appeals disposed of the question which is being presented to this Court. Part B is directed to a demonstration that the complained of presumption evolved out of a misapplication of a principal of equity. Part C is directed to the public policy considerations which necessarily must attend any considerations undertaken in the course of the disposition of this cause.

A

The Court of Appeals By-Passed the Question Presented by Recognizing the Error in the Admission of the Complained Of Evidence and Then Noting Only the One Correct Statement of the Rules of Evidence Which the Trial Court Made While Ignoring the Statements of the Trial Court Which Reflected an Illegal Application of the Complained Of Evidence in Arriving at Its Finding and By Determining That the Error Was Harmless on the Basis of the Said Editing of the Trial Court's Concluding Statements

At the trial the trial court admitted the complained of evidence under the theory that it probably would constitute legitimate evidence of criminal intent. It was urged in the Seventh Circuit that this theory was ill taken because offenses under Title 21, United States Code, Section 331(a) (2) are strict liability offenses and the Seventh Circuit agreed with this contention and with the contention that the trial court committed error in admitting the complained of evidence. The Seventh Circuit further stated that it would have been prejudicial error requiring reversal of the trial court in this cause if it had been by jury instead of by court. But, because the petitioner had waived jury, the Seventh Circuit held that "since this was a bench trial and since it appears from the record that the trial judge did not consider the erroneously admitted evidence in reaching his findings of fact, we hold that the error does not justify reversal." In presenting its basis for finding that the record showed that the trial judge did not consider the complained of evidence the Seventh Circuit quoted the first paragraph of the judge's concluding remarks where he stated: "this question essentially boils down to that question of who are you going to believe—who am I going to believe? I am, of course, talking primarily about the essential elements of the crimes charged in these various counts of the indictment." The Seventh Circuit stated that "This language demonstrates

that the court below did not consider the improperly admitted evidence of other crimes."

> "So he had prostitutes on his premises. He had slot machines on his premises. According to him he takes in any tramp that walks up the road. And yet he wants me to believe that he (the petitioner) is absolutely free and clear of the offense with which he is charged.
>
> * * *
>
> "The criminal mind just does not work that way, and we are dealing here with a criminal mind, on his own admission that he has heretofore been convicted of various offenses, some of which are felonies."

In view of those portions of the trial judge's concluding comments which were ignored by the Seventh Circuit, the holding in this case necessarily was that the presumption that a trial judge does not consider erroneously admitted evidence in arriving at a finding in a trial by court is a conclusive presumption.

B

What, for all Practical Purposes, Is an Irrebuttable Presumption That a Trial Judge in a Trial by Court Considers Only the Competent Evidence Before Him in Arriving at His Finding, Notwithstanding the Errors He May Have Committed in Admitting Incompetent Evidence, Constitutes a Presumption Which Has Evolved in Direct Opposition to the Prior Decisions of This Court on This Point and Which Has Evolved as a Result of an Unthinking Application by the Federal Circuit Courts of a Rule Which Developed in Equity Cases to Cases at Law, Which Rule Was Sound in Equity Cases but Has No Rational Basis in Cases at Law.

In a number of decisions rendered by this Court in the last century it was uniformly held that rulings on the admissibility of evidence in a trial by court were cognizable on appeal as factors which could support a prayer for reversal.

> "When a court sits in place of a jury and finds the facts, this court cannot review that finding. If there is any error in such case shown by the record, in admitting or rejecting testimony, it can be reviewed here." *Bassett v. United States*, 76 U.S. 38, 19 L. Ed. 548 (1872.
>
> "To the declaration the defendants pleaded the general issue and the parties, by written stipulation filed with the clerk of the court, waived a jury . . . any rulings of the court in the progress of the trial, if excepted to at the time and duly presented by bills of exceptions, may be reviewed by us. *Dickinson v. Planters' Bank*, 83 U.S. 250, 21 L. Ed. 278 (1973).
>
> "Where a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special as in cases where an issue of fact is tried by a jury; but

where the finding is general the parties are concluded by the determination of the court except in cases where exceptions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general. *Mercantile Ins. Co. v. Folsom*, 85 U.S. 237, 21 L. Ed. 827 (1874).

Also see:

Ohio v. Marcy, 85 U.S. 552, 21 L. Ed. 812 (1873)

Dirst v. Morris, 81 U.S. 484, 20 L. Ed. 722 (1872)

Cooper v. Omohundro, 86 U.S. 65, 22 L. Ed. 47 (1874)

Crews v. Brewer, 86 U.S. 37, 22 L. Ed. 62 (1874)

Springfield Ins. v. Sea, 88 U.S. 158, 22 L. Ed. 511 (1874)

Tyng v. Grinnel, 92 U.S. 467, 23 L. Ed. 467 (1876)

Otoe County v. Baldwin, 111 U.S. 1, 28 L. Ed. 331, 4 S. Ct. 265 (1884)

Town of Martintown v. Fairbanks, 112 U.S. 670, 28 L. Ed. 862, 5 S. Ct. 321 (1885)

Probably as the result of certain changes in the nature of this Court's jurisdiction there do not appear to be any later cases where this Court considered the question.

About 1920 the Eighth Circuit questioned the need for considering errors in rulings on the admissibility of evidence in equity cases:

"It is well settled that appeals in equity are heard de novo and disposed of finally, without remanding the cause for further trial, except in some exceptional causes which do not apply in this case. If the chancellor erred in the admission of evidence objected to, the appellate court will disregard such evidence, and, unless the decree can be sustained on competent evidence, it will be reversed." *Unkle v. Willis*, 281 F. 28, 34 (8th Cir. 1922).

Subsequently the Ninth and Tenth Circuits joined the Eighth Circuit in applying the rule to chancellory cases: *National Reserve Ins. v. Scudder*, 71 F.2d 884 (9th Cir. 1934) and *Elliott v. Gordon*, 70 F.2d 9 (10th Cir. 1934). It would be difficult to dispute the wisdom of the rule in cases in equity where the appeal is almost a second trial and where the first trial usually is conducted under emergency conditions where the issues have not been formed clearly and where the safest course of action is to hear all of the evidence indiscriminately. But none of the factors which make the complained of presumption a matter of simple common sense in cases in equity exist as factors in cases at law. But the presumption nonetheless came to be applied to appellate cases at law as well as equity without any notice being given to the different considerations that apply in cases at law:

> "In *any case* tried without a jury, there is a presumption that the trial court considered only legal evidence and disregarded that which was incompetent. *Unkle v. Willis*, (C.C.A. 8) 281 F. 29, 34." (Emphasis supplied.) *Wade v. Blieden*, 86 F.2d 75 (8th Cir. 1936). Also see: *Wall v. United States*, 98 F.2d 672 (10th Cir. 1938).

The application of the complained of presumption to cases at law is without a rational basis. To be sure, judges, as opposed to jurors, are more capable of disregarding what the law requires to be disregarded in resolving questions of fact but judges, too, have human limitations in this respect as was noted by one of our most distinguished legal minds—Justice Learned Hand, in *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), spoke of recommendations to the jury of mental gymnastics which are beyond, "not only their powers but anybody's else." Where, as in this case, the concluding remarks of the trial court unmistakably reflect an active consideration of the erroneously admitted evidence, the application of the complained of presumption not only is lacking in a rational basis, it also presents a due process question of constitutional proportions.

C

The Practice of Resolving Issues of Fact in a Trial by Court upon a Waiver of Jury Is a Practice Which Is Highly Important to the Continued Disposition of Legal Disputes in a Prompt and Efficient Manner. The Complained of Presumption That a Trial Judge Can Do No Wrong in Determining the Relevancy and Competence of Evidence in a Trial by Court Operates To Cause the Said Practice To Be an Unattractive Alternative in a Large Number of Lawsuits with the Result That Court Time Is Consumed Unnecessarily by Trials-by-Jury Which Would Be Trials-by-Court if the Said Presumption Were Not Undermining the Typical Litigant's Assurance That a Waiver of Trial-by-Jury Will Not Amount to an Additional Waiver of the Litigant's Right to Strict Adherence to Procedural Due Process at His Trial.

The application of the complained of presumption to cases at law as well as cases in equity leaves civil and criminal litigants with a lack of alternatives in determining how they want their issues resolved. Where there is a totally permissive appeals court attitude toward procedural rulings in a trial by court a waiver of trial by jury necessarily constitutes a waiver of a formal trial and the litigant must make an all or nothing decision and demand trial by jury if he wants to be assured of anything more than a summary proceeding.

If evidentiary and procedural objections at trials by court were given force and effect by appellate review of the rulings thereon, which would be the case if the above-cited line of cases in this Court were followed, the alternatives would be increased substantially. If a waiver of jury were to amount to nothing more than a waiver of jury, counsel and the parties at the trial could undertake further waivers by not objecting and by agreements and stipulations which

would be undertaken intelligently as the issues became clarified with the introduction of evidence. So long as a waiver of jury, by operation of case decisions such as that rendered herein, amounts to a waiver of formal trial proceedings as well, the alternatives remain extremely limited.

Apart from these general-practical considerations, the fact remains that the petitioner in this cause intelligently waived nothing more than a trial by jury but the Seventh Circuit's decision causes that waiver to be far more sweeping in its practical effect. A waiver of one Constitutional right should not be construed as a waiver of additional Constitutional rights. Constitutional waivers must be strictly construed and, for this reason, the petitioner herein should be awarded a new trial as the Seventh Circuit has said he would have been awarded had he not waived trial by jury.

CONCLUSION

The petitioner herein, as a criminal defendant, waived trial by jury and received a trial at which the presentation of the government and the inquiry by the court deviated so substantially from the matters at issue in the case, over objection, that the Seventh Circuit, on appeal, ruled that reversible error was committed but the petitioner was not entitled to such a reversal because of his waiver of jury. The petitioner should be awarded his new trial notwithstanding his waiver of jury and the petitioner prays for relief accordingly.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16832
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CHESTER DEWITT MENK,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

November 21, 1968

Before CASTLE, *Chief Judge*, HASTINGS and FAIRCHILD, *Circuit Judges.*

CASTLE, *Chief Judge.* Defendant-Appellant, Chester DeWitt Menk, was charged in a two-count indictment with selling a certain amount of amphetamine drugs to a government agent, John Sopsic, on two separate occasions, in violation of 21 U.S.C. §331(q)(2). Appellant pleaded not guilty, waived jury trial, and was convicted of both counts and sentenced to serve two years consecutively on each count. On appeal, appellant contends that the judgment of conviction must be reversed because the trial court admitted into evidence certain proof regarding other allegedly unconnected crimes and considered this evidence in finding appellant guilty of the offenses charged. The government, on the other hand, argues that the evidence of other crimes was admitted only in connection with crimes closely connected with the offenses charged

and only in determining the credibility of appellant, who had testified in his own behalf. Appellant, in his brief, admits that the evidence was sufficient to convict, and even recognizes that "a *prima facie* case was presented" by the government.

The record discloses that during the government's case in chief, witness Sopsic testified about certain conversations he had had with appellant and co-defendant, Minnie Bingham, regarding slot machines, alleged prostitution, a prior drug offense, appellant's threat to kill a past informer and any future informer, an incident where appellant attacked two excise men, and dealing in stolen goods, as well as the offenses charged. Objections to this evidence on the grounds of irrelevancy and prejudice were overruled.[1] The only other government witness was a chemist for the Food and Drug Administration who testified about the chemical composition of the drugs introduced into evidence by the Government.

The first defense witness was co-defendant, Minnie Bingham. On cross-examination of this witness, there was some mention of a raid of appellant's business establishment, the Shifting Sands truckstop, and about the working conditions of the waitresses employed by appellant at that establishment. After a short direct examination of the third co-defendant, Elmer Menk, appellant's brother, appellant took the stand.

On direct examination of appellant, he testified about the following events: Appellant had been in the Federal Penitentiary at Terre Haute as the result of selling "these pills" in 1960; he had been convicted in 1933 for grand larceny; he had served 30 days on a penal farm for being involved in a dance hall fight in 1929; he was convicted in 1958 or 1959 for an offense involving his attack on two excise agents; he was currently charged with possession of a slot machine without a stamp; he hired employees for the Shifting Sands truckstop by picking up "any tramp that comes along the road" and offering them a job; his business had been raided on

[1] The Court sustained one defense objection—regarding a statement made by co-defendant Bingham to Sopsic that appellant had had a "run in with the law"—insofar as it related to appellant.

October 20, 1966; he had sold slot machines in August, 1965. On cross-examination, there was more dialogue about the girls who worked for appellant and he stated that he paid them nothing for their work but that they made their living from tips.

Appellant's theory at trial, as stated in his brief, was that he was "a long-time lawbreaker" who had become apprehensive of impending prosecution and had therefore exercised no control over any of the illicit activities conducted at his truckstop. The government's theory, substantiated by Sopsic's testimony, was that appellant controlled and supplied the pills illegally sold, and merely dealt through Minnie Bingham as an intermediary.

Thus, evidence of other crimes was introduced at two different stages of the trial: (1) during the government's case in chief, before appellant's credibility was put in issue; (2) during the testimony of the defendants. Since different issues are involved in each of the instances in which evidence of other crimes was introduced, we shall discuss them separately.

1. The evidence of other crimes introduced and admitted over objection during the government's case in chief did not relate to crimes so closely connected with the offenses charged as to constitute "res gestae." Nor could it have been properly admitted to prove intent since intent was not an element of the offenses charged under 21 U.S.C. §331, *Palmer* v. *United States,* 340 F. 2d 48, 49 (9th Cir. 1964); cf. *United States* v. *Dotterweich,* 320 U.S. 277 (1943). Nor was this evidence admitted in relation to appellant's credibility since his credibility had not yet been put in issue. We therefore hold that the admission of such evidence constituted error, and if this had been a jury trial we would be compelled to reverse. *United States* v. *Reed,* 376 F. 2d 226, 228-229 (7th Cir. 1967); *United States* v. *White,* 355 F. 2d 909, 910-911 (7th Cir. 1966). However, since this was a bench trial and since it appears from the record that the trial judge did not consider the erroneously admitted evidence in reaching his findings of fact, we hold that the error does not justify reversal.

The trial court's Findings of Fact begin with the following language:

> "So we get down to the question of fact. Did these people do what they are charged with doing or didn't they? Mr. Sopsic says they did and they say that they didn't. They have all taken the witness stand and denied, under oath, what he has sworn to under oath. So this question essentially boils down to that question of who are you going to believe—who am I going to believe? I am, of course, talking primarily about the essential elements of the crimes charged in these various counts of the indictment."

This language demonstrates that the court below did not consider the improperly admitted evidence of other crimes. Rather, the only issue recognized by the court was that of credibility, and the only evidence used to determine this issue was that adduced from the testimony of the defendants themselves. The District Court, in its Findings of Fact, analyzes the defendant's testimony in detail and comes to the conclusion that appellant's word could not be believed, regarding the offenses charged, over that of the government agent.

Although, we cannot probe the mind of the trial judge any more thoroughly, we likewise cannot presume error by inferring that he considered the improperly admitted evidence in reaching his findings. It is well settled that "harmless error is not grounds for reversal and the appellant has both the burden of proving error and of showing that he was prejudiced thereby." *Sawyer* v. *Berczak*, 229 F. 2d 805, 809 (7th Cir. 1956); *Thomas* v. *United States*, 281 F. 2d 132, 136 (8th Cir. 1960). In *United States* v. *Bolden*, 355 F. 2d 453, at 456 (7th Cir. 1965) cert. den. 384 U.S. 1012, this court stated in a factual situation more favorable to the defendant than in the instant case:

> "Trial judges are invariably called upon to conduct impartial trials despite whatever opinion they may have or which they may formulate during the course of the trial concerning the guilt or innocence of an accused. Such impartiality is precisely what is ex-

> pected of them, and an experienced trial judge must be assumed capable of performing his essential function. In short, prejudice must be shown by trial conduct; it may not be presumed or inferred from the subjective views of the judge."

We therefore hold that a trained, experienced Federal District Court judge, as distinguished from a jury, must be presumed to have exercised the proper discretion in distinguishing between the improper and the proper evidence introduced at trial, and to have based his decision only on the latter, in the absence of a clear showing to the contrary by appellant. As we held in *United States* v. *D'Antonio*, 362 F. 2d 151, at 155 (7th Cir. 1966):

> "The minor errors we have found in this lengthy trial do not in our opinion warrant, much less require, a reversal. An accused is entitled to a fair trial, but not to a trial free of all error. *Lutwak* v. *United States*, 344 U.S. 604, 619. . . . Unsubstantial error is not to be viewed in an attitude separated from reality and oblivious to the content of the record and as thus isolated relied upon to furnish the basis for reversal. Otherwise, a judgment which could be affirmed would be almost impossible to achieve."

We therefore find no reversible error in the admission of evidence of other crimes during the government's case in chief.

2. The evidence of other crimes admitted during the testimony of the defense witnesses likewise does not constitute reversible error. First of all, it was introduced by appellant himself to demonstrate his theory that he was a "long-time lawbreaker" who was avoiding any contact with illicit activities because of his record and because he was currently under investigation. Moreover, any evidence of prior convictions introduced after appellant took the stand was admissible as bearing on his credibility, which was then in issue. *United States* v. *Plata*, 361 F. 2d 958, 962 (7th Cir. 1966); *United States* v. *Pinna*, 229 F. 2d 216, 219 (7th Cir. 1956); *United States* v. *Lange*, 161 F. 2d 699, 704 (7th Cir. 1947). In any case,

the cross-examination of the appellant covered only those areas raised on direct examination. We find no error here.

For the foregoing reasons, the judgment of conviction is affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3695—The Scheffer Press, Inc., Chicago, Illinois—11-21-68—200

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1324

CHESTER DEWITT MENK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-20) is reported at 406 F.2d 124. The district court wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1968, and a petition for rehearing

was denied on January 29, 1969.[1] On March 5, 1969 (pursuant to a telegraphic request received on February 28), Mr. Justice Marshall extended the time within which petitioner might file a petition for a writ of certiorari until March 13, 1969. On March 14, 1969, Mr. Justice Fortas further extended this time until March 23, and on March 25 Mr. Justice Marshall granted an additional extension until March 30. Despite these extensions, the petition was not filed until April 28, 1969,[2] and is thus out of the time under Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether the court of appeals correctly concluded that, in the circumstances of this non-jury trial, the improper introduction of evidence relating to prior crimes committed by petitioner and other irrelevant matters did not require reversal of his convictions.

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[1] See the unpaginated record of the court of appeals proceedings on file in the Clerk's office.

[2] The petition had been received by the Clerk prior to the expiration of the period (as extended) within which it was required to be filed, but no certified record had been received as of that date. When the record still had not been received as of April 17, 1969 (eighteen days after the time for filing, as extended, had expired), the Clerk returned the lodged copies of the petition to petitioner's counsel. On April 22, a certified copy of the record of the proceedings in the court of appeals and a certified copy of petitioner's court of appeals brief (containing a narrative transcript of the trial proceedings as an appendix) were received by the Clerk. On April 28, the copies of the petition which had been returned were again submitted; the petition was thus not effectively filed until that date. See Rules 21(1) and (2) of the Rules of this Court.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on Counts 2 and 3 of a four-count indictment charging that he and two co-defendants sold amphetamine tablets, in violation of 21 U.S.C. (Supp. III) 331(q)(2)[3] (Tr. 206, 261-262, 264, 270).[4] Count 2 charged a sale by petitioner and co-defendant Minnie Bingham on July 26, 1966, and Count 3 a sale by the same persons on October 5, 1966 (Tr. 206).[5] On December 1, 1967, petitioner was sentenced to two years' imprisonment on each count, the terms to run consecutively (Pet. 7; Pet. App. 15). The court of appeals affirmed (Pet. App. 15-20).

On June 18, 1966, an agent of the Federal Bureau of Drug Abuse Control, Department of Health, Education and Welfare, acting in an undercover capacity, visited the Shifting Sands Truck Stop, a restaurant operated by petitioner, and asked co-defendant Minnie Bingham, an employee, whether she could procure stimulant drugs, particularly amphetamines, for him (Tr. 29-32, 63-65, 67-68). Mrs. Bingham told the

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[3] Section 331(q)(2) of 21 U.S.C. (Supp. III) prohibits the sale of a drug in violation of Section 360a(b). Section 360a(b) forbids the sale, with inapplicable exceptions, of any depressant or stimulant drug. A "depressant or stimulant drug" is defined in Section 321(v)(2) to include any drug containing amphetamine or any of its salts or optical isomers. The penalty provisions are contained in Section 333.

[4] "Tr." refers to the transcript of the trial proceedings, a copy of which is being lodged herewith.

[5] Counts 1 and 4 did not involve petitioner.

agent she could supply him with all the drugs he wanted and gave him two amphetamine tablets as samples of what was available (Tr. 65-66). On July 8, 1966, the agent returned to the restaurant and bought 100 tablets of the drug from Mrs. Bingham, who at that time identified petitioner as her supplier (Tr. 32-37).

On July 26, 1966, the agent again discussed drugs with Mrs. Bingham and later that evening met petitioner (Tr. 43-44). Petitioner told the agent that he had to be very careful because the police were trying to initiate an "undercover case" against him. He explained that he had been arrested once before for selling drugs after being "set up" by one of his friends. He said that because of certain "state charges" that were currently pending against him (apparently relating to slot machines) he was letting Mrs. Bingham run the restaurant and his illegal drug business (Tr. 44-45). In response to the agent's expressed wish to buy 1,000 amphetamine tablets, petitioner absented himself momentarily, returned with a paper bag, and told the agent to "[s]ee Minnie" about the pills. The agent paid Mrs. Bingham the agreed-upon purchase price and secured the tablets from a hiding place on the premises where Mrs. Bingham told him they would be found (Tr. 46-48).

During the conversation which eventuated in the foregoing transaction, petitioner stated to the agent that if he could identify the person who had betrayed him in connection with the drug sale for which he had previously been arrested he would kill him, and that if it happened again he would kill the person who turned him in and the officer. He also told the agent

about an instance in which he had once prevented the arrest of his brother by two excise officers by hitting one of the officers over the head with a shotgun (Tr. 44-45). An objection by petitioner's counsel to this evidence of "other alleged crimes"—on the ground that there was "no connection between an alleged assault and battery and going to kill an informer and the case here"—was overruled (Tr. 45-46).[6] On October 5, 1966, petitioner sold the agent an additional 1,000 tablets, the agent again delivering the purchase money to Mrs. Bingham in accordance with petitioner's instructions (Tr. 50-54, 58).

Testifying in her own behalf, Mrs. Bingham admitted selling amphetamine pills to the agent (her defense was entrapment), but denied that she had acted for petitioner in the transactions (Tr. 152-153, 157-159, 165, 167-168, 178-184, 187-192).[7] Petitioner, similarly testifying in his own defense, denied having had anything to do with the sales (Tr. 206). His theory of defense, as stated in his brief in the court of appeals, was that as "a long-time lawbreaker" he had become apprehensive of impending prosecution and had therefore exercised no control over any of the illicit activities conducted at his establishment (see Pet. App. 17). He testified on direct examination

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[6] Contrary to petitioner's statement that the trial court repeatedly overruled defense objections to collateral inquiry concerning crimes other than those charged (Pet. 3), this is the only instance reflected in the record of a defense objection based on this ground.

[7] Mrs. Bingham claimed that she procured the drugs from other employees of the restaurant (Tr. 153, 178-183, 187-189).

that he had served 30 days on a penal farm for being involved in a dance hall fight in 1929; that he had been convicted of grand larceny in 1933; that in 1958 or 1959 he had been convicted for an offense involving an attack on two excise agents; and that he had pleaded guilty in 1960 to selling "these pills," for which he had been sentenced to two years in a federal penitentiary (Tr. 207-208). He acknowledged that he had bought slot machines (apparently illegally) at some unspecified time in the recent past and that he was currently charged with possession of a slot machine without a stamp (Tr. 211, 229-230). He said he hired waitresses for his restaurant by picking up "any tramp that comes along the road" and letting them run the place (Tr. 218).

The trial judge, in rendering his verdict, noted that the issue before him was essentially one of credibility —whether to believe the agent or the defendants (Tr. 264-265). Following a detailed discussion of petitioner's and Mrs. Bingham's testimony, he concluded that he could not accept their versions of the events insofar as they conflicted with the agent's, which he found credible and convincing (Tr. 265-270).

The court of appeals held that the admission during the government's case in chief of evidence of offenses by petitioner other than those charged had been error, and that reversal would have been required had the trial been before a jury; it concluded, however, that since trial had been to the court and it appeared from the record that the judge had not considered the erroneously admitted evidence in an improper way in reaching his verdict, reversal was not warranted (Pet. App. 17-19).

ARGUMENT

As shown previously (*supra*, pp. 1-2), the instant petition was not filed on time. At all events the issue sought to be presented is without substance.

Even assuming *arguendo* that the court of appeals was correct in ruling that the admission of evidence of other offenses by petitioner during the government's case in chief was erroneous, despite several theories on which such admission might be justified, the court of appeals properly held that error not to require a reversal. A judge, as distinguished from a jury, as the court noted (Pet. App. 19), must be presumed to have exercised appropriate discretion in distinguishing between proper and improper evidence introduced at trial and, in the absence of a clear showing to the contrary, to have based his decision only on the former. *Alexander* v. *United States*, 241 F.2d 351, 356-357 (C.A. 8), certiorari denied, 354 U.S. 940; *Clark* v. *United States*, 211 F.2d 100, 106 (C.A. 8), certiorari denied, 348 U.S. 911; *Murray* v. *United States*, 117 F.2d 40, 45 (C.A. 8). Nothing in the remarks made by the trial judge in announcing the verdicts indicates that he made improper inferences from the government-elicited evidence of petitioner's prior offenses. The only issue recognized by the judge, as the court of appeals observed (Pet. App. 18), was that of credibility, and the only evidence used to determine that issue was, with but one exception,[8] the testimony of the de-

[8] The exception relates to the judge's reference to petitioner's waitresses as prostitutes (Tr. 267-268). The judge noted that they had been so characterized by the agent (see Tr.

fendants themselves (Tr. 265-269). The judge's reference to petitioner's "criminal mind"—the allusion primarily relied upon (Pet. 2, 6, 9)—reflects on its face that it was from petitioner's own direct testimony that the judge inferred his criminal mentality (Tr. 267): "The criminal mind just does not work that way, and we are dealing here with a criminal mind, *on his own admission that he has heretofore been convicted of various offenses*, some of which are felonies." [Emphasis added.]

The quoted comment also indicates that the judge did not infer petitioner's guilt of the offenses charged from a mere general criminal propensity or predisposition—the inference which the law forbids (cf. 1 Wharton, *Criminal Evidence*, § 232 (12th ed. 1955); 1 Underhill, *Criminal Evidence*, § 205 (5th ed. 1956)). The comment was made in the context of a discussion of petitioner's *credibility*. It is well settled that prior convictions of a witness, including those of a defendant who takes the stand, may properly be considered in determining the extent to which his testimony should be credited (3 Wharton, *supra*, §§ 934-939; 1 Underhill, *supra*, §§ 244-245).

At all events, the admission of the government-elicited evidence of prior offenses by petitioner can hardly be considered prejudicial in the context of a

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112-113), and that the defendants had not denied this (Tr. 268). It is to be noted, moreover, that petitioner not only did not deny that the waitresses were prostitutes, he implicitly confirmed the fact (and sought to turn it to his advantage) by his testimony on direct examination that he hired his female help by picking up "any tramp that comes along the road" (Tr. 218).

case in which the accused's basic defense strategy involved a showing that he had been "a long-time lawbreaker" (*supra*, pp. 5-6). Where the accused's theory of defense is based on the portrayal of himself as a persistent violator of the laws, the admission of prosecution evidence which tends to support that portrayal must be deemed harmless.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

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